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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1911

No. [redacted]89

COSME BLANCO HERRERA AND JOSÉ BLANCO HERRERA, DOING BUSINESS UNDER THE FIRM NAME OF HERRERA NEPHEWS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 12, 1906.

(21,752.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 270.

COSME BLANCO HERRERA AND JOSÉ BLANCO HERRERA, DOING BUSINESS UNDER THE FIRM NAME OF HERRERA NEPHEWS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1910.

1 In the Court of Claims.

No. 25,425.

COSME BLANCO HERRERA and JOSÉ BLANCO HERRERA
vs.
THE UNITED STATES.

I. *Petition and Amended Petition.*

The claimants, on the 15th day of June 1904 filed their original petition.

On June 29, 1905, by leave of Court, in lieu of said original petition, said claimants filed their amended petition, which is as follows:

2 In the Court of Claims.

No. 25,425.

COSME BLANCO HERRERA and JOSÉ BLANCO HERRERA
v.
THE UNITED STATES.

Amended Petition.

(Filed June 29, 1905.)

To the Honorable the Court of Claims:

Your claimants, Cosme Blanco Herrera and José Blanco Herrera, respectfully represent:

That they are citizens of the Republic of Cuba and reside in the city of Havana, and that on or about the 17th day of July, in the year 1898, your claimants were in existence as a copartnership, known under the firm name and style of Herrera's Nephews, doing business in the city of Havana and other ports and places in the Island of Cuba.

That on or about the 16th day of July, 1898, the United States being at war with Spain, the Spanish forces occupying the territory which constitutes the Division of Santiago, including the city and port of that name, capitulated to the United States according to the terms of a military convention, which provided that all hostilities between American and Spanish forces in the said district should absolutely and unequivocably cease, and that said capitulation should include "all forces and war material in the said territory." That on entering the said city of Santiago in accordance with the terms of the said capitulation the United States authorities

3 found in the harbor several boats and vessels belonging to various persons, and among said vessels the steamship *San*

Juan, the property of your claimants, which had been held and detained in the harbor of Santiago by reason of the blockade of said harbor and port maintained by the naval authorities of the United States.

That the said authorities of the United States took possession of the steamship San Juan as private property and without any claim of title by reason of capture, or confiscation, or forfeiture, and used her for proper and lawful governmental purposes, namely the transportation of troops and munitions of war.

That the authorities of the United States so held, detained and used said steamship *San Juan* to the entire exclusion of her owners, to wit your said claimants, from on or about the 24th day of July, 1898, till on or about the 18th day of May, 1899.

That your claimants were deprived of the use and profits of the said steamship by the United States for a period of two hundred and ninety-four (294) days, to wit from July 24, 1898, to May 18, 1899, or thereabouts, and that the sum of Three hundred dollars ($300) per day, amounting to Eighty-eight thousand two hundred dollars ($88,200) for the said period of two hundred and ninety-four (294) days would be a fair and reasonable compensation for the loss of the use and profits of the said steamship, together with Five thousand dollars ($5,000) for the loss, while in the possession of the authorities of the United States, of china, crockery and linen belonging to and on board of the said steamship and fairly worth the said sum, amounting in all to Ninety-three thousand two hundred dollars ($93,200).

That the United States authorities have failed entirely to pay the said amount of Ninety-three thousand two hundred dollars ($93,200) or any sum whatever, for the use and detention of
4 the said steamship and the loss of the said stores, and still refuse payment therefor.

That your claimants on or about the 2d day of November, 1898, and succeeding days until May 18, 1899, endeavored to secure the return of the said steamship from the military authorities of the United States, but the said authorities refused to return the said steamship unless your claimants would give to the said military authorities of the United States an absolute release from any and all claims for compensation for the use and detention of the said steamship by the said military authorities of the United States as aforesaid. This your claimants refused to do until on or about the said 18th day of May, 1899, when Robert Scott Douglass, your petitioner's agent, received the said vessel, the *San Juan*, from Maj. J. T. Knight, Chief Quartermaster at Santiago, and under duress executed said release.

That your claimants were compelled to execute the said release by the statement of said military authorities of the United States that the said vessel would be held and confiscated by the United States in the event of your claimants' continued refusal to accept the same on the terms proposed by the aforesaid military authorities of the United States.

That the detention and use by the United States military authori-

ties of the said vessel *San Juan* without proper compensation was in violation of a regulation of an Executive Department of the United States, to wit of the War Department as expressed in General Orders No. 101 of July 18, 1898, which were issued for the guidance of the officers and forces of the United States in Cuba, and which provided specifically as to the manner in which private property was to be treated during the military occupation of the Island of Cuba by forces of the United States, and especially as to the manner in which private property, when taken for the use of the United States should be paid for.

That the said order provided as follows:

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only as hereafter indicated. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

"Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible receipts are to be given." Richardson's Presidents' Messages, Vol. X, pp. 208, 210.)

That your petitioners have repeatedly demanded payment of the United States for the said use and detention of their vessel, and that such payment has been repeatedly neglected and refused.

That the said firm of Herrera's Nephews was dissolved and liquidated in and about the month of January, 1903, and that your claimants held and retained to their own joint and several use all right, title and interest in and to the claim herein set forth.

That the claimants are the sole owners of this claim and the only persons interested therein, and no assignment or transfer of this claim, or of any part thereof or any interest therein, has been made.

The claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and setoffs.

Wherefore your claimants pray judgment in the sum of Ninety-three thousand two hundred dollars ($93,200).

COUDERT BROTHERS,
CRAMMOND KENNEDY,
Attorneys for Claimants.

FRANK D. PAVEY,
Of Counsel.

AMERICAN CONSULATE GENERAL,
Havana, Cuba, ss:

Cosme Blanco Herrera and José Blanco Herrera, being duly sworn, each deposes and says: I am one of the claimants in this case. I have read the foregoing amended petition, and the matters therein stated of my own knowledge are true and those stated on information and belief I believe to be true.

COSME BLANCO HERRERA.
JOSÉ BLANCO HERRERA.

Subscribed and sworn to before me this 20th day of June, 1905.

JOSEPH A. SPRINGER,
[SEAL.] *American Vice-Consul General.*

Fee No. 686 $2.

7 II. *Traverse.*

Filed March 18, 1908.

In the Court of Claims of the United States, December Term, A. D. 1908.

No. 25,425.

COSME BLANCO HERRERA and JOSE BLANCO HERRERA, Doing Business under the Firm Name of Herrera's Nephews,

vs.

THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

8 III. *Submission of Case.*

At a Court of Claims held on the 18th day of March, 1908, Messrs. Coudert Brothers and Mr. Crammond Kennedy, attorneys for the claimants, and Mr. Franklin W. Collins, on behalf of the defendants, submitted this cause.

9 IV. *Findings of Fact and Conclusion of Law and Opinion of the Court.*

Filed May 4, 1908.

COSME BLANCO HERRERA and JOSE BLANCO HERRERA, Doing Business under the Firm Name of Herrera Nephews,

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimants, Cosme Blanco Herrera and José Blanco Herrera, were, at the time of the taking of the property hereinafter men-

tioned, a commercial partnership doing business under the firm name of Herrera Nephews.

Said partners were born in Spain and were Spanish subjects during the Spanish régime in Cuba, residing in Habana. Neither of the claimants, after the exchange of the ratifications of the treaty of Paris between the United States and Spain, has, under the provisions of Article IX of said treaty, preserved his allegiance to the Crown of Spain by making a declaration of his decision to preserve such allegiance.

II.

Said claimants were, at the time of the capitulation of the city of Santiago to the American forces, on the 16th day of July, 1898, the owners of a certain steamship named the *San Juan*.

III.

On the date last mentioned the Spanish forces then occupying the territory which constituted the division of Santiago, including the city and port of that name, capitulated to the United States in accordance with the terms of a military convention which provided that all hostilities between the American and Spanish forces in said district should cease and that the Spanish forces should be returned, at the expense of the United States, to Spain.

Actual hostilities ceased with the surrender of Santiago. On entering the city of Santiago the United States authorities found in the harbor of Santiago said steamship *San Juan*, there held and detained by the blockade of the harbor and port by the United States naval authorities.

Said military authorities seized and captured said steamer *San Juan* on the 17th day of July, 1898, and thereafter used it for the transportation of troops, munitions of war, and stores and supplies to the troops and to indigent Cubans until November 8, 1898, a period of 115 days. The United States paid the cost of operating said steamer during said period. The reasonable value of the use of said vessel for said period of 115 days was $150 per day, amounting to the sum of $17,250, no part of which has been paid to claimants. Prior to its seizure as aforesaid said vessel had been used to transport Spanish troops, munitions of war, and supplies for the Spanish troops from place to place.

After the surrender of Santiago and the seizure of said steamer as aforesaid, the Secretary of War, on July 18, 1898, in pursuance of the proclamation of the President of July 13, 1898, issued General Order No. 101, which, among other things, provides that—

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. * * *

"Private property taken for the use of the Army is to be paid for,

when possible, in cash, at a fair valuation, and when payment in cash is not possible receipts are to be given."

Said order was promulgated in Cuba July 20, 1898.

IV.

On November 8, 1898, the Quartermaster-General of the Army sent the following telegram to R. A. C. Smith, New York, the representative and attorney in fact of claimants:

"It is proposed to return captured steamer *San Juan* to owners. Please wire name of owners."

On November 12, 1898, said Smith, after communicating with claimants, wrote the Quartermaster-General that claimants agreed to accept the vessel, reserving their right to make claim. Thereafter, on November 15, 1898, the War Department notified said Smith that the Government was ready to deliver said vessel to her owners upon condition that a receipt therefor be given by said owners, with a statement that the vessel is accepted with a full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damage sustained while the vessel was in the possession of the United States, and that any claim subsequently made for such use and damage shall be a matter for future consideration of the War Department.

Claimants refused to accept the vessel on the terms offered and she remained in the possession of the United States authorities.

11 V.

On April 25, 1899, Major Knight, quartermaster at Santiago, on instructions from the War Department, wrote claimants' agent at Santiago as follows:

"You are respectfully informed that the honorable Secretary of War has ordered that if the owners of the *San Juan* do not receive the ship in accordance with the conditions hereinafter expressed said vessel shall be delivered to the Department of the Quartermaster of the Army and retained as the property of the United States."

Thereafter, on May 17, 1899, claimants accepted said vessel, and gave a receipt and release for the same in the following language:

"Received this 17th day of May, 1899, at Santiago, Cuba, from Maj. John T. Knight, quartermaster, U. S. Army, chief quartermaster Department of Santiago, the steamship *San Juan*, which vessel is accepted with the full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damages sustained while the vessel has been in possession of the United States Government, the return of the vessel being a generous act on the part of the United States Government, and that any claim subsequently made for such use and damages shall be a matter for future consideration of the War Department.

"And we name and authorize our agents in Santiago de Cuba—

Messrs. Gallego, Mesa & Co., of said city—to receive and take possession of said steamship *San Juan*.

"SOBRINOS DE HERRERA.
"JOSÉ BLANCO HERRERA.
"SOBRINOS DE HERRERA.
"COSME BLANCO HERRERA."

"To all to whom these presents shall come or may concern, Greeting:

"Know ye that we, Cosme Blanco Herrera and José Blanco Herrera, composing the firm of Sobrinos de Herrera (Herrera's Nephews), owners of the steamship *San Juan*, for and in consideration of the prompt return of the said steamship to our said firm in Habana, or to our legal representatives at Santiago de Cuba (the said vessel having been taken into the possession of the United States, by the officers, agents, or servants thereof, in the port of Santiago de Cuba, upon the surrender of the port by the Spanish military authorities to the military authorities of the United States, and having since been in the possession and use of the United States Government), release and forever discharge, and do by these presents, for themselves, their heirs, administrators, and assigns, release and forever discharge the said Government of the United States, and its officers, agents, or servants, of and from all manner of actions, damages, claims, and demands whatsoever which, against the said United States Government, or any of its officers or agents, the said Sobrinos de Herrera ever had, now have, or may have by reason of the seizure or taking possession of the said steamship *San Juan* as aforesaid by the United States Government, its officers, agents, or servants, or by reason of the subsequent retention of possession of the said
12 vessel, or by its use by the Government of the United States, its servants, officers, or agents.

"And the said Sobrinos de Herrera further covenant that they are the parties lawfully interested in the premises, and have good right to receive the said steamship and to give this release.

"Done at the city of Habana, Cuba, this 17th day of May, 1899.

"[SEAL.] SOBRINOS DE HERRERA.
"[SEAL.] JOSÉ BLANCO HERRERA.
"[SEAL.] COSME BLANCO HERRERA.
"[SEAL.] SOBRINOS DE HERRERA.

"Witness:
"I. N. SAVITTA."

VI.

From about November 9, 1898, when the claimants were notified by the Quartermaster-General of the United States Army that the United States proposed to return to them said vessel, until May 17, 1899, a period of 190 days, said vessel, though retained by the United States as set forth in finding V, was not used by them. During said period of detention the United States kept on board said vessel a watchman, who was paid by them $45 per month.

If the claimants are entitled to compensation for the use of said vessel during said period, the reasonable value thereof, taking into consideration that the vessel was not used during said period, would be $125 per day for 190 days, or $23,750.

VII.

It appears that upon the return of said vessel to claimants by the United States authorities tools and implements of the value of $232.50 were missing from said vessel, but it is not shown by whom said tools and implements were taken.

It is not shown what crockery ware, linen, cutlery, and other table articles, and other furniture were on board said vessel when taken possession of by the United States authorities.

At the time said steamer was turned over to claimants it appears to have been in as good condition, ordinary wear and tear excepted, as when taken possession of by said authorities.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law, on the authority of the case of *Hijo v. United States* (194 U. S., 315), that the claim herein is one arising from the capture and use of a vessel as an act of war, and the court is therefore without jurisdiction, and the petition is dismissed.

Opinion.

PEELLE, *Ch. J.*, delivered the opinion of the court:

This action is founded on a claim for the use and damage for the detention of the steamship *San Juan*, owned by Spanish subjects, captured in the port of Santiago, Cuba, during the war with Spain, July, 1898. The seizure was by the Army, and no question of prize is involved.

13 But for the averment in the petition that the vessel herein was taken possession of by the United States "as private property and without any claim of title by reason of capture, or confiscation, or forfeiture," and used for lawful governmental purposes, the question of the liability of the United States might perhaps have been determined under rule 37 and 92 before either party had incurred expense in the taking of testimony.

This case is ruled by that of *Hijo v. The United States* (194 U. S. R., 315, 320), unless excepted therefrom by reason of the relation of the United States to Cuba. That case, like the one here, was for the capture, use, and damage for detention of a vessel, owned by Spanish subjects, in the port of Ponce, P. R., at the time of the capture and surrender of that port and city in July, 1898, to the naval and military forces of the United States.

There, as here, the vessel was used or detained by the military forces under the orders of the Quartermaster's Department of the Army until April, 1899, when the vessel, as here, was returned to the

owners on condition that all claims for use or damage for detention should be waived, which was done.

In each case the vessel captured was owned by Spanish subjects, and the capture, use and detention of the vessel occurred during the war with Spain, which war, says the court in the case cited, "did not in law cease until the ratification in April, 1899, of the treaty of peace."

In the case the contention was that the claim arose out of an implied contract, and that an action could be maintained thereon under section 1 of the act of March 3, 1887, commonly known as the Tucker Act. (24 Stat. L., 505.) But in response to that contention the court, by Mr. Justice Harlan, said:

"The present suit finds no sanction in the above act, even if the plaintiff were not a foreign corporation. Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an Executive Department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case, for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purposes of gain. * * * The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but, as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of armies,' says Kent, 'does not terminate the war, but it is one of the *commercia belli* which suspends its operations. * * * At the expiration of the truce hostilities
14 may recommence without any fresh declaration of war.' (1 Kent, 159, 161.) If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace. Besides, the treaty of peace between the two countries provided that 'the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle all claims of its citizens against Spain relinquished in this article.' This stipulation clearly embraces the

claim of the plaintiff—its claim against the United States for indemnity having arisen prior to the exchange of ratifications of the treaty of peace with Spain.

"We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the courts. (*The Cherokee Tobacco*, 11 Wall., 616, 621; *Whitney v. Robertson*, 124 U. S., 190, 194; *United States v. Lee Yen Tai*, 185 U. S., 213, 221.)"

We have thus quoted from that case at length because the ruling and language in that case cover the present case completely, unless excepted therefrom by reason of the peculiar relation of the United States to Cuba, and as to that let us now inquire.

It must be borne in mind that at the time of the capture and use of the vessel in question Cuba was under the dominion and sovereignty of Spain, and so remained until relinquished by the terms of the treaty of Paris, when, on December 13, 1898, the United States, pursuant to the terms of that treaty, entered into the occupacy of said island and established therein a military government and maintained the same under the direction of the President as Commander in Chief of the Army and Navy of the United States until May, 1902, when the government and control of the island were transferred to the President and Congress of the Republic of Cuba.

Even if it should be conceded that the surrender of the port and city of Santiago to the military and naval forces of the United States in July, 1898, carried with it the sovereignty of the United States over that particular district, still by the protocol of August 12, 1898, the United States in effect conceded the sovereignty of Spain over the island. The protocol—a basis for the establishment of peace—which in terms suspended hostilities between the two countries, did not operate either to suspend or terminate the sovereignty of Spain over Cuba. By article V thereof provision was made for the appointment of commissioners to meet at Paris not later than October 1, 1898, to treat of peace; and it was not until by article I of the Treaty of Paris of December 10, 1898, that Spain relinquished "all claim of sovereignty over and title to Cuba." Hence the United States thereby recognized the sovereignty and authority of Spain over Cuba until terminated by the treaty; and though for some purposes the military authorities of the United States had prior thereto exercised dominion over particular parts of the territory acquired by conquest, the island nevertheless was foreign territory, held in trust by the United States for the inhabitants thereof. The conquest was not with the intention of holding or taking title to the island or any part thereof, as had previously been declared by the joint resolution of Congress.

In other words, "during the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operations, or express provisions, extinguishes his title forever"

(Sec. 545 Wheaton's International Law and authorities there cited). Here, while by the treaty the sovereignty of Spain was relinquished, it was not transferred to the United States, so that the authority of the United States over the island or any district thereof was, as expressed in said joint resolution, only "for the pacification thereof."

In the case of *Neely v. Henkel* (180 U. S., 109, 120) the court, after reviewing the objects intended to be accomplished by the war with Spain and the military occupation thereof as disclosed by public acts and official documents, said:

"Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

"It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territorially held in trust for the inhabitants of Cuba, to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

But the contention of the claimants is that their action is based on the Executive order of the President of July 13, 1898, which was promulgated by the Secretary of War in General Order No. 101, July 18, 1898, providing, among other things, as follows:

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained. * * *

"Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation; and when payment in cash is not possible receipts are to be given."

The contention is that the order of the President so promulgated is a regulation of the War Department, and that, therefore, they are entitled to maintain their action thereon under section 1, act of 1887. But this question, we think, is fully met by the ruling in the case of *Hijo v. The United States, supra*—that is to say, "the
16 seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the

vessel after actual hostilities were suspended by the protocol of August 12, 1898." And this, we think, applies with equal force to Cuba as to Porto Rico, as the vessel captured was owned by Spanish subjects, natives of Spain, residing in Cuba. Native Spaniards who were Spanish subjects residing in Cuba during said war were enemies, and their property was entitled to no more protection from the United States than other Spanish subjects, and particularly when, as in the present case, the vessel prior to its capture had been used in transporting Spanish troops, munitions of war, and supplies for the Spanish troops from place to place.

While the military and naval forces of the United States were enjoined by the Executive order to respect "private property, whether belonging to individuals or corporations," it also authorized the confiscation of such property for cause. Besides, the same order authorized the seizure, by the military occupant, of the means of transportation, including "telegraph lines and cables, railways and boats," although such property belonged to private individuals or corporations. True, when so seized the order directed the return of such property "unless destroyed under military necessity."

The Government, in the present case, elected to return the vessel instead of destroying it, but the return thereof is an argument in favor of the generosity of the Government and not a confession that the seizure was not an act of war.

But it is contended that the joint resolution of Congress respecting the independence of the people of Cuba and the relinquishment of Spanish authority in the island, coupled with the disclaimer on the part of the United States to exercise sovereignty, jurisdiction, or control over said island—other than for the pacification thereof—operated to constitute the people of Cuba an ally to force Spain to relinquish her authority and control in said island, thereby segregating from Spanish territory as enemy's country said island.

And from official documents as well as from the history of the time, of which the court takes judicial notice, the insurrectionists in said island against the Government of Spain did coöperate with the military forces of the United States in liberating Cuba from Spanish control. But the island was nevertheless under the sovereignty and control of Spain during the capture and use of the vessel in question, which capture and use were held by the executive department of the Government as a military necessity arising in the belligerent prosecution of the war, and for that reason the Department denied to the claimants herein any compensation therefor.

What the United States did to establish and maintain the freedom and independence of Cuba was voluntarily undertaken and done; and in the execution of the purpose of the joint resolutions it was the judgment of the President, charged therewith, that the capture of the vessel and its use for the military and humane purposes set forth in the findings were for purposes of war and not for again. In this view of the case individual rights must give way to the
17 rights of the people of Cuba, for whose independence the United States intervened and for whose benefit the island was later held in trust.

But if we should assume that because of the acts of the United States the island was not enemy's country and the claimants, by reason of their residence in Cuba, were not enemies, still the court would be confronted with Article VII of the treaty of Paris, which provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war."

The claimants herein were not only Spanish subjects, but were natives of Spain, so that whatever claim may have accrued to them against the United States during said war was relinquished in the treaty by the act of Spain.

Nor do we deem it material in the present case to consider the difference between native Cubans as subjects of Spain and natives of Spain who were subjects thereof residing in Cuba, for it is clear that whatever claim the subjects of Spain had against the United States from the date of the insurrection in Cuba to the date of the exchange of ratifications of the treaty were relinquished; and while the United States by Article VII of the treaty agreed to "adjudicate and settle the claims of its citizens against Spain," thereby protecting Spain against the claims of any citizen of the United States, Spain did not obligate itself by the treaty to pay the claims of her subjects against the United States which she had relinquished; but we do not see that this is material or that it in any way strengthens the claimants' right to recover for the use or damages for the detention of their vessel. By the act of Spain the United States were released from the payment of such claims, and they can not now be asserted against the United States.

True, within the time prescribed by Article IX of the treaty the claimants renounced their allegiance to Spain, and thereby adopted the nationality of Cuba; but that was long after the capture, use, and detention of the vessel and after the return thereof to the claimants, as set forth in the findings.

We deem it unnecessary to enter upon a discussion of the circumstances under which the vessel was restored to the claimants further than to say that no right to recover for the use and detention of the vessel can be predicated on the action of the War Department in requiring the claimants to accept the return of their vessel under the circumstances of this case, for even if the claimants had been permitted to receive the vessel under protest reserving in the receipt in express terms their right to prosecute a claim for the use and detention of the vessel, it would have availed them nothing, as there was no element of contract either in the capture, use, or detention of the vessel, nor was anything said by the officers of the Government from which there could be implied an agreement or obligation to pay therefor, and the claim being one sounding in tort no action will lie thereon against the United States on the order of the President.

For these reasons the numerous cases cited by the claimants, to

the effect that where the Government appropriates private
18 property which it does not claim as its own it does so under an implied contract to pay therefor, have no application in this case. Nor has the case of the *Philippine Sugar Estates Development Company* (40 C. Cls. R., 33), for the reason that at the time of the taking of the property in that case war with Spain had ceased; the Philippine Islands had been ceded to and were under the control and dominion of the United States; the country had been reduced to subjection before the taking of the property, and hence it was held that an implied contract arose to pay for the property so taken. But that is not the case here, as the capture and use of the vessel were both during the war with Spain, and even before the occupation of Cuba by the military forces of the United States.

Although we have reached the conclusion that the case of *Hijo v. The United States, supra*, is controlling in the present case, notwithstanding the peculiar relation of the United States to Cuba, we have found the facts on the merits of the case for the reason that in the case just cited the court, in concluding its opinion, said: "We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the courts." So that if, in case of appeal, the Supreme Court should differ with this court and hold that an action could be maintained under the act of March, 1887, they would then have before them the question whether the treaty, as in that case, operated to relinquish the claim herein.

For the reasons we have given we must hold that the court is without jurisdiction; and we may add that if we should take jurisdiction we should feel constrained under the wording of the treaty to apply it in this case, so that in either event the claimants must fail; and for that reason their petition is dismissed.

BY THE COURT.

Howry, J., was not present when this case was heard on the claimants' motion for new trial and took no part in the decision.

19 *V. Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 4th day of May, 1908, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants, and do order, adjudge and decree, that the petition of the claimants, Cosme Blanco Herrera and José Blanco Herrera, doing business under the firm name of Herrera Nephews, be and the same is hereby, dismissed.

BY THE COURT.

20 VII. *Argument and Submission of Claimants' Motion for New Trial and Order Thereon.*

On the 26th day of April, 1909, the claimants' motion for a new trial, filed December 5, 1908, was argued by Mr. Howard T. Kingsbury and by Mr. Crammond Kennedy, attorneys for the claimants, and by Mr. Franklin W. Collins, for the defendants and submitted.

On the 20th day of May, 1909, the Court filed the following order: Overruled,

By the Court,

STANTON J. PEELLE,
Chief Justice.

21 VII. *Application for and Allowance of Appeal.*

Motion for Allowance of Appeal to the Supreme Court.

Come now the claimants, by their attorneys, and move this Honorable Court for the allowance of an appeal to the Supreme Court of the United States from the judgment of this Court entered on the 20th day of May, 1909, in this cause.

COUDERT BROTHERS AND
CRAMMOND KENNEDY,
Attorneys for Claimants.

FRANK D. PAVEY,
Of Counsel.

Filed July 3, 1909.
Allowed July 8, 1909, by Chief Justice Peelle, in vacation.

22 In the Court of Claims.

No. 25425.

COSME BLANCO HERRERA and JOSE BLANCO HERRERA, Doing Business as a Firm of Herrera Nephews,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the Court; of the judgment of the Court; of the argument and submission of the claimants' motion for new trial, and of the order thereon; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 9 day of July, 1909.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 21,752. Court of Claims. Term No. 270. Cosme Blanco Herrera and Jose Blanco Herrera, doing business under the firm name of Herrera Nephews, appellants, vs. The United States. Filed July 12th, 1909. File No. 21,752.